

JOHN MOORE)	
Claimant)	
VS.)	
)	Docket No. 220,848
STAG PARKWAY, INC.,)	
Respondent)	
AND)	
)	
KEMPER INSURANCE COMPANIES)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carriers)	

Respondent appealed the March 18, 1998, Award by Administrative Law Judge Nelsonna Potts Barnes. Appeals Board heard oral argument on November 13, 1998, in Wichita, Kansas.

Claimant appeared by his attorney, Randy S. Stalcup of Wichita, Kansas. Respondent and its insurance carrier, Kemper Insurance Companies, appeared by and through their attorney, Richard J. Liby appearing for P. Kelly Donley of Wichita, Kansas. Douglas D. Johnson, attorney for respondent's insurance carrier, Liberty Mutual Insurance Company, did not appear because the parties dismissed Liberty Mutual Insurance Company from the claim on December 9, 1997.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the award. Additionally, the parties agreed the discovery deposition of claimant taken by the respondent on November 10, 1997, is part of the record.

ISSUES

The claimant initially alleged he injured his low back while working for the respondent in April 1994 and on March 29, 1996. The Administrative Law Judge found claimant was not entitled to permanent partial disability benefits as a result of the alleged April 1994 accident because the record proved the injury was temporary in nature. Respondent and its insurance carrier at that time, Liberty Mutual Insurance Company, were found responsible for only claimant's medical treatment for the April 1994 injury which had been paid. By agreement of the parties, Liberty Mutual Insurance Company was dismissed from the claim on December 9, 1997. No appeal was taken from the Administrative Law Judge's finding in regard to the April 1994 accidental injury. Therefore, those findings and conclusions remain in full force and effect.

For claimant's March 29, 1996, accident, the Administrative Law Judge awarded claimant a 37 percent permanent partial general disability based on a work disability. Respondent appealed and contends claimant is not entitled to a work disability award because he was terminated from his employment for cause not associated with the work injury. Accordingly, respondent argues claimant retains the ability to earn a comparable wage and is, therefore, limited to permanent partial general disability benefits based on his permanent functional impairment. Additionally, respondent contends claimant is earning, at his post-injury employment, more than 90 percent of his pre-injury average weekly wage. Thus, respondent argues K.S.A. 44-510e(a) limits claimant's permanent partial general disability benefits to his permanent functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Findings of Fact

(1) Claimant started working for the respondent in 1993 as a sales representative covering a sales territory by automobile consisting of Colorado, South Dakota, Nebraska, Kansas, a portion of Iowa, and a portion of the Kansas City Metropolitan area.

(2) The claimant injured his low back on March 29, 1996, as he was lifting a sample case out the trunk of his car.

(3) Respondent first provided conservative medical treatment for claimant's back injury with orthopedic surgeon Robert L. Eyster, M.D. Respondent then referred claimant to neurosurgeon Paul S. Stein, M.D.

(4) Dr. Stein diagnosed claimant with a left S1 radiculopathy and a disk herniation at L5-S1. On November 11, 1996, Dr. Stein performed left L5-S1 discectomy and microdissection.

(5) Claimant returned to his sales representative job on or about December 1, 1996, but for approximately the first week did not service his customers by automobile but contacted them instead by phone. Claimant testified he started driving again approximately two weeks before respondent terminated his employment on December 23, 1996. However, Dr. Stein's medical note of December 4, 1996, indicates claimant was to start out driving a few miles per week and gradually build up to driving the numerous miles required to service his large sales territory.

(6) Claimant testified his regional sales manager, Craig Mellor, terminated his employment with the respondent on December 23, 1996. The primary reason for the termination was the claimant was not meeting the sales projections. Other reasons were that claimant allegedly solicited Amway business from customers and claimant improperly tagged product at a major account.

Claimant testified the reasons he was not able to meet the sales projections were that his sales territory had been decreased by three states and the respondent had lost a major account in the Coleman Company of Wichita, Kansas. Claimant denied he sold Amway products to respondent's customers, and the reason he was not able to complete the tagging of the products was because the respondent had not supplied him with the proper tags. Claimant felt he was not terminated for good cause.

(7) After claimant's termination, he received unemployment benefits for six months and, as required, applied regularly for other jobs while receiving such benefits. Claimant also testified he was involved with job services seeking employment and sent

out from 30 to 40 applications before he found employment at Cessna Aircraft Company on August 25, 1997.

(8) Respondent contends claimant's pre-injury average gross weekly wage was \$674.32. The record contained the following wage and benefit information on which the average weekly wage was computed:

	Weekly Amount
a. Weekly Base Pay	\$565.00
b. Monthly Sales Commission	23.08
c. 1994 Year End Bonus (\$1,500)	28.85
d. Cost to Respondent of Medical and Dental Insurance	54.73
e. Cost to Respondent of Life Insurance	1.58
f. Personal Income for use of Company Car	<u>1.08</u>
TOTAL	\$674.32

(9) Claimant testified the respondent provided a 1994 Ford Taurus automobile for him to drive for business and personal use. Claimant drove the automobile 45,000 miles per year for business use and 300 - 500 miles per year for personal use.

Claimant argues his pre-injury average weekly wage was \$867.63 which included his base wage, sales commissions, and fringe benefits in the amount of \$675.32 plus \$192.31 per week for the value of the Ford Taurus, based on the automobile's value of \$10,000 divided by 52 weeks in the year. Claimant further testified he was told by respondent the value of 1994 Ford Taurus was part of his salary. However, claimant also testified the respondent did not include the income on his W-2 or on a 1099 and he paid no income tax on that alleged amount of income.

(10) Larry Sell, a certified public accountant, testified on behalf of the respondent in regard to the personal use annual value of the 1994 Taurus if the claimant drove the Taurus 500 personal miles and 45,000 business miles. Assuming the highest value of a 1994 Taurus and assuming the respondent supplied the gas for the Taurus, the personal use value would be \$108 per year or \$2.08 per week.

(11) Claimant claims his post-injury average weekly wage at Cessna is \$560.93 per week. Respondent, on the other hand, argues that claimant's post-injury wage at Cessna is \$823.59 per week.

(12) The parties stipulated claimant suffered an 11.5 percent permanent functional impairment as a result of his low-back work injury.

(13) At the request of his attorney, claimant was examined and evaluated by Daniel D. Zimmerman, M.D., of Westwood, Kansas. Dr. Zimmerman saw claimant once and opined claimant had sustained a 13 percent whole body functional impairment as a result of his work injury. He restricted claimant to lifting 20 pounds occasionally and lifting 10 pounds frequently. Claimant should avoid frequent flexing of the lumbosacral spine which would include avoiding frequent bending, stooping, squatting, crawling, and kneeling repetitively over extended periods of time. Dr. Zimmerman was shown a list of work tasks performed by the claimant in the 15-year period preceding claimant's accident which was compiled by vocational expert Karen Terrill. Dr. Zimmerman opined claimant could no longer perform eight of the thirteen work tasks for a 62 percent work task loss.

(14) Treating physician Dr. Stein's medical records were introduced into evidence by stipulation. Dr. Stein found claimant's low back injury resulted in a 10 percent whole body functional impairment. He deferred to the functional capacity evaluation (FCE) completed by Rehabilitation Center in Wichita, Kansas, on January 23, 1997, for claimant's permanent work restrictions. Those records were admitted into evidence by stipulation and concluded claimant could function in the light to medium physical demand category which limited the claimant to lifting 35 pounds occasionally, 15 pounds frequently, and 7 pounds continuously. The parties also stipulated, if Dr. Stein would have testified and utilized the FCE's work restrictions, claimant would have a 54 percent work task loss.

Conclusions of Law

(1) Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which the right depends. K.S.A. 44-501(a).

(2) If claimant unreasonably refuses to accept or even attempt to perform offer accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

(3) Even if the accommodated work is not offered, claimant still must show he made a good faith effort to find employment. If claimant did not make a good faith effort, a

wage will be imputed to the claimant based on the evidence contained in the record as to the claimant's earning ability. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(4) The Appeals Board concludes there is no evidence in the record that claimant's termination was related to his work-related injury. However, the Appeals Board also concludes there is no evidence in the record that claimant's termination was the result of his deliberate or intentional misconduct. Claimant's explanation, that the reason he was unable to meet his sales projections was the result of the loss of sales territory and a major customer, is uncontradicted.

Therefore, the Appeals Board concludes, since there was no evidence of malfeasance on the part of the claimant, the policy considerations as announced in Foulk do not apply. Under these facts, the Appeals Board would not impute to the claimant the pre-injury wage he was earning while employed by respondent. Accordingly, the claimant should not be precluded from receiving a work disability from the date of his termination. See Zarnowski v. Collingwood Grain, Inc., Docket No. 190,684 (April 1996).

(5) K.S.A. 44-511 defines additional compensation to include and mean only the following:

(A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of \$25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans

(6) The appropriate weekly amount to be included in claimant's pre-injury average weekly wage for the value of the personal use of the Taurus automobile provided by the respondent to claimant is \$2.08 per week. Therefore, the Appeals Board concludes claimant's pre-injury average weekly wage is \$675.32.

(7) The Appeals Board concludes the most accurate basis to compute claimant's post-injury average weekly wage at Cessna Aircraft Company is to utilize claimant's statement of earnings and deductions admitted into evidence for the 13-week period from August 25, 1996, through November 23, 1996, plus the testimony and exhibits admitted into evidence at the deposition of Betty Dwight, Cessna's director of benefit administration.

The Appeals Board concludes claimant's post-injury average weekly wage is \$624.08. This average weekly wage was computed as follows:

a.	Weekly Base Pay of \$11.01 per hour x 40 hours	\$440.40
b.	Average Weekly Overtime paid over 13 weeks	62.95
c.	Shift Premium paid over 13 weeks	31.48
d.	Other Earnings paid over 13 weeks	.81
e.	Employer's Cost of Fringe Benefits	<u>88.44</u>
	TOTAL	\$624.08

(8) K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . .

(9) However, K.S.A. 44-510e(a) limits the award to functional impairment so long as the claimant earns a wage equal to 90 percent or more of the pre-injury average weekly wage.

(10) Except for the four weeks claimant was paid temporary total disability benefits after his surgery, claimant did not miss work after his March 29, 1996, accident. Therefore, claimant is entitled to permanent partial general disability benefits based on the stipulated functional impairment of 11.5 percent from March 30, 1996, through his termination on December 23, 1996.

(11) The Appeals Board concludes claimant established, after his termination, that he made a good faith effort to find other appropriate employment. Therefore, the Appeals Board concludes claimant is entitled to a work disability from December 24, 1996, the day following his termination, until August 24, 1997, the day before he commenced working for Cessna.

(12) The record contains the opinions of two physicians on the issue of claimant's loss of work task performing ability. Dr. Zimmerman testified claimant had a 62 percent loss of work task performing ability, and the parties stipulated that if Dr. Stein would have testified his work task loss opinion would have been 54 percent. The Appeals Board concludes there is no reason to give more weight to one physician's opinion over the other. Therefore, the Appeals Board concludes claimant has a 58 percent work task loss and a 100 percent wage loss entitling claimant to a 79 percent work disability from December 24, 1996, through August 24, 1997.

On August 25, 1997, claimant obtained employment earning \$624.08 per week which is more than 90 percent of his pre-injury weekly wage of \$675.32. Thereafter, claimant's entitlement to permanent partial disability benefits is limited to his functional impairment which has already been paid in full.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated March 18, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, John Moore, and against the respondent, Stag Parkway, Inc., and its insurance carrier, Kemper Insurance Companies, for an accidental injury sustained on March 29, 1996, and based upon an average weekly wage of \$675.32.

Claimant is entitled 4 weeks of temporary total disability compensation at the rate of \$326 per week or \$1,304.00, followed by 34.43 weeks of permanent partial disability compensation at the rate of \$326 per week or \$11,224.18 for an 11.5% permanent partial general functional disability through December 23, 1996, followed by 34.86 weeks of permanent partial disability compensation at the rate of \$326 per week or \$11,364.36 for a 79% work disability through August 24, 1997, making a total award of \$23,892.54.

As of December 30, 1998, the entire award is due and owing claimant and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
P. Kelly Donley, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director